

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHESLEY K. MCDONALD

Claimant

VS.

CERTAINTEED CORP.

Self-Insured Respondent

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Docket No. 258,289

ORDER

Claimant appealed Administrative Law Judge Robert H. Foerschler's Award dated March 26, 2002. The Board heard oral argument on October 8, 2002.

APPEARANCES

John A. Christiansen of Blue Springs, Missouri, appeared for the claimant. Mark A. Kolich of Kansas City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The parties stipulated that if timely written claim was made the claimant suffered a 19 percent permanent partial general body functional impairment and is entitled to the maximum compensation rate of \$326.

ISSUES

The Administrative Law Judge denied compensation because the claimant failed to make timely written claim pursuant to K.S.A. 44-520a.

The sole issue raised on review by the claimant is whether timely written claim was made. Claimant argues he received authorized medical treatment within 200 days of making written claim for compensation. Claimant further argues that he had not been notified that his medical treatment had been terminated.

Respondent contends the Administrative Law Judge's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant suffered accidental injury arising out of and in the course of his employment on August 28, 1995. Claimant was loading rolls of fiberglass when his foot was caught and jerked out from underneath him and he fell. Claimant fell on his left side and he hit the palm of his hand on the floor. Claimant was initially treated for shoulder and neck complaints.

Claimant saw the company doctor and then was referred to physical therapy in Kansas City, Missouri. Claimant returned to the company doctor and then was referred to Dr. Jeffrey MacMillan. Claimant received some cortisone shots in his shoulder. Dr. MacMillan referred the claimant to Dr. Edward Bruce Toby.

The first time Dr. Toby saw the claimant was on July 29, 1996. Claimant was having problems with his neck, shoulders, arms and hands. Dr. Toby recommended shoulder x-rays, and a CT/arthrogram of his shoulder.

Ultimately, Dr. Toby performed carpal tunnel releases on November 17, 1998, (right side) and November 26, 1998, (left side). Dr. Toby did not treat claimant's shoulder. Upon recovery from the surgery the claimant did not have any numbness and Dr. Toby felt claimant's overall recovery was excellent. Dr. Toby last saw the claimant on February 3, 1999, and released the claimant from his care. Dr. Toby opined that it was very clear he was releasing claimant from further care with no return appointment.

Dr. Toby did recommend claimant be referred to Dr. Glenn Amundson regarding his shoulder and neck complaints. Instead, claimant was referred to Dr. Stephen L. Reintjes, a neurosurgeon. Dr. Reintjes saw the claimant on June 14, 1999, with regard to neck and upper back complaints. Dr. Reintjes ordered an MRI. After the MRI was performed the claimant saw Dr. Reintjes on June 28, 1999. Dr. Reintjes advised the claimant of his MRI results and that no additional medical treatment was necessary. Dr. Reintjes did not schedule any follow-up appointments for the claimant and released him from treatment on June 28, 1999.

The claimant did not receive any additional medical treatment until he returned to the company doctor three times in May 2000. Claimant testified the company doctor checked both arms, neck and shoulder during the three visits. Claimant filed his Application for Hearing with the Division on August 14, 2000.

K.S.A. 44-520a provides in pertinent part:

(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation.

The furnishing of medical care to an injured employee is considered the payment of compensation under the Workers Compensation Act when authorized, either expressly or by reasonable implication, by the employer.¹ If an employer is on notice that an employee is seeking treatment on the assumption that treatment is authorized by the employer, the employer is under a duty to disabuse the employee of that assumption if the employer expects the 200-day limitation to take effect.²

Claimant argues he received medical treatment within 200 days of his written application. Claimant argues that his visits to the company physician in May 2000 was clearly within 200 days of the written claim dated August 14, 2000. In addition, claimant argues that he was never notified that his right to medical treatment had been terminated.

In the interim between claimant's last visit to Dr. Reintjes on June 28, 1999, and claimant's visit to the plant physician in May 2000, there is no assertion made or evidence that claimant was receiving any medical treatment. More than 200 days elapsed between claimant's last visit to Dr. Reintjes and his visit to the company physician. Accordingly, by the time claimant went to the plant physician in May 2000, the time limitation had expired.

When the time for filing a claim for compensation has passed the right to recover is lost and cannot be revived.³ Moreover, a claim once barred due to the running of the statute of limitations cannot be revived even by subsequent voluntary payments of compensation by the employer.⁴

The claimant's treatment had concluded. Dr. Toby had advised claimant in February 1999 that his treatment for carpal tunnel syndrome had concluded and no further appointments were scheduled. On June 28, 1999, Dr. Reintjes advised claimant that no further treatment was necessary for his neck and shoulder complaints and no further

¹ *Sparks v. Wichita White Truck Trailer Center, Inc.*, 7 Kan. App.2d 383, 642 P.2d 574 (1982).

² *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 516 P.2d 1008 (1973).

³ *Graham v. Pomeroy*, 143 Kan. 974, 57 P.2d 19 (1936).

⁴ *Solorio v. Wilson & Co.*, 161 Kan. 518, 169 P.2d 822 (1946).

appointments were scheduled. Claimant did not seek additional medical treatment for approximately 11 months.

In *Shields v. J. E. Dunn Constr. Co.*, 24 Kan App.2d 382, 946 P.2d 94 (1997), the written claim for compensation was served upon the employer more than 200 days after the last medical appointment. Shields argued that she assumed medical treatment was ongoing because she continued to use a prescribed TENS unit. The Court rejected the argument noting the unsupervised use of a TENS unit and her failure to return for a scheduled medical appointment lead to the conclusion she was not operating under a reasonable assumption that her medical treatment was ongoing.

In this case, the claimant's authorized medical treatment had concluded and no further medical appointments were scheduled. More than 300 days elapsed between claimant's last treatment from Dr. Reintjes and when he sought additional treatment from the company physician. It cannot be stated that claimant was operating under a reasonable assumption that his medical treatment was ongoing under these facts.

Claimant was required by K.S.A. 44-520a to serve upon the employer a written claim for compensation within 200 days of his last medical treatment with Dr. Reintjes on June 28, 1999. The written claim was made over 400 days from that last treatment. Accordingly, the Administrative Law Judge's determination claimant did not make a timely written claim is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated March 26, 2002, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John A. Christiansen, Attorney for Claimant
 Mark A. Kolich, Attorney for Respondent
 Robert H. Foerschler, Administrative Law Judge
 Director, Division of Workers Compensation